

A “retailer maintaining a place of business in Illinois” as described in 86 Ill. Adm. Code 150.201(i), is required to register with the State as an Illinois Use Tax collector. See 86 Ill. Adm. Code 150.801. (This is a GIL).

May 25, 2000

Dear Xxxxx:

This letter is in response to your letter dated March 24, 2000. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120(b) and (c), which can be found on the Internet at <http://www.revenue.state.il.us/legalinformation/regs/part1200>.

In your letter, you have stated and made inquiry as follows:

We represent a company (the “Company”) that has asked us to identify the Illinois income, sales and use tax liabilities, if any, that it may incur as a result of its operations. The Company’s question relates to whether, based on the facts set forth below, it has nexus for Illinois sales/use and/or income tax purposes. We believe the answer is no and request that the Illinois Department of Revenue (the “Department”) confirm our conclusion. Alternatively, if the Department believes that a different conclusion applies, we request that the Department inform us of that conclusion together with its analysis relating thereto.

Factual Overview

The Company is a corporation incorporated in a state outside of Illinois (in “State X”) and engaged in the business of retail sales of product (the “Product”) from a retail facility located solely in State X. A small percentage of the Company’s customers are residents of Illinois. As typical of all customers, customers from Illinois visit the Company’s retail facility and/or review the Company’s circulars and place an order for the Product either in person at the retail facility or at some later time over the telephone after visiting the retail facility.

Upon ordering the Product, customers may pick up the Product at the Company’s retail facility or request that the Product be delivered. Customers who request delivery may choose to use any contract or common carrier (the company itself does not deliver Product to customers). When a customer does not select a carrier, the Company selects a specific carrier (the “Carrier”) to deliver the Product. Approximately 80% to 90% of all Product sold to Illinois customers is delivered by the Carrier. As discussed in more detail below, the Carrier is a separate State X corporation that is paid by the Company, on an arm’s length basis, to perform delivery and certain other services.

A large percentage of deliveries made by the Carrier are made to customers who live within a relatively short distance of the Company's retail facility. In these instances, the Company does not charge the customer for the delivery service (i.e., the cost of delivery is not separately stated). When delivery is made outside this delivery-free area, a delivery charge is added by the Company, as a separately stated item, to its invoices for the Product. As set forth immediately above, the Company itself pays the Carrier a fair market value charge for all deliveries of Product made by the Carrier.

Company salespersons schedule the delivery date with the customer, generally at the point of sale or after the Product is received in stock. Once the delivery date is scheduled, employees of the Carrier confirm the delivery date with the customer. Employees of the Carrier package and load the Product on the Carrier's delivery trucks and deliver the Product to the location designated by the customer. Upon arrival at the delivery location, employees of the Carrier will unload, assemble and place the Product as directed by the customer, inspect the Product for damage and, if necessary, make minor repairs. If the Product is damaged beyond repair or if the customer is dissatisfied, the Carrier will return the Product to the Company, which in turn will return the Product to the manufacturer. In those cases (which are relatively rare) where the customer is scheduled to pay for the Product in cash on delivery ("COD"), the Carrier will also collect the COD payment from the customer and remit it to the Company. The Carrier does not sell additional Product or items related to the Product on behalf of the Company.

The manufacturer of the Product and/or the Company typically warrants the Product for some period of time, and, in a small percentage of cases (relating to approximately 5-10% of Product sold), a customer (including an Illinois customer) may report some type of problem with the Product that is covered under warranty. The Company does not perform warranty work on the Product. Any warranty work is instead performed by the Carrier. The Company routes all customer service requests to the Carrier, which then typically performs such service work at the customer's location (although, in some cases, the Product is brought by the Carrier to the Carrier's location in State X, repaired, and returned to the customer by the Carrier). For warranty work performed by the Carrier that is covered by a manufacturer's warranty, the manufacturer will make a remittance to the Company, which then forwards the entire amount on to the Carrier. The Company itself pays the Carrier, at the time the Product is sold, a fair market value fee to cover any other warranty work that may need to be done on the Product. In rare cases, a customer will request that service work be performed on the Product that is not covered by warranty; in these cases, Carrier performs the work and is paid by the customer.

The Carrier and the Company are separate State X corporations, although several (but not all) of the owners of the Company are also owners of the Carrier and the same individuals serve on both the Carrier's and the Company's boards of directors. Also, the facilities of the Carrier and the Company are located in the same building in State X. Nevertheless, the Company and the Carrier each maintain separate corporate minute

books, bank accounts, general ledgers and financial statements, and file separate tax returns. The Company and the Carrier are managed by different people who possess a different skill set and experience and conduct business with each other on an arms-length basis. The Carrier owns or leases all trucks used for delivery in its own name. The Carrier is responsible for all costs associated with its business, including costs of insurance, employees, maintaining its delivery vehicles, etc. The Company pays the Carrier to perform the delivery and warranty services described herein as well as warehousing services which occur solely in State X. The Carrier, in turn, pays the Company to perform accounting and other administrative services. The Carrier controls the training of all of its employees as well as the manner in which it provides its delivery services. The Company's only role in the Carrier's delivery services is to designate the delivery and service date with the customer.

The Company has no employees or other representatives who work in Illinois and does not have any stores, warehouses, inventory, bank accounts or other presence in Illinois. The company does not advertise in Illinois newspapers or on Illinois TV or radio stations. The Company does advertise through direct mailings to prior customers (including prior Illinois customers); in a State X newspaper that apparently has a limited circulation in Illinois; and through a website. The Company does not currently engage in electronic commerce.

Question Presented

Based on the facts set forth above, do the activities of the Carrier in Illinois cause the Company to incur any Illinois income and/or sales or use tax liabilities with respect to the sale of Product to Illinois customers?

Analysis

1. *Sales and Use Tax Issues.*

With respect to sales and use taxes, the Company does not accept purchase orders in Illinois nor does it maintain inventory in Illinois. Therefore, the Company is not an Illinois retailer and not subject to the Illinois Retailer's Occupation Tax.

Moreover, the Company is not required to collect Illinois Use Tax on its sales to Illinois customers because it does not qualify as a "retailer maintaining a place of business in Illinois" within the meaning of 86 Ill. Adm. Code 150.501(i). See 86 Ill. Adm. Code 150.801(a). In particular, based on the facts presented, the Company: (1) does not maintain any place of business in Illinois; (2) does not solicit orders by means of a telecommunication or television shopping system; (3) does not solicit orders by means of advertising disseminated primarily to Illinois customers; (4) does not solicit orders by means of the mail to Illinois on a substantial and recurring basis while benefiting from banking, financing, debt collection, telecommunication, or marketing activities or from Illinois installation, servicing or repair facilities; (5) is not owned or controlled by the

same interests which own or control any other retailer engaging in the same or similar line of business in Illinois; (6) does not have a franchise or licensee operating in Illinois under its trade name; and (7) does not solicit orders by means of advertising transmitted over a cable television system in Illinois pursuant to a contract with a Illinois cable television operator.

In addition, the Company has no employees, representative, independent contractors, or agents operating in Illinois under its authority. With regard to this last point, the facts show that the Carrier is an independent entity, operating for its own account. In fact, the Department has already ruled on what appears to be a situation very similar to that presented here. Private Letter Ruling No. ST-99-0031-PLR (Sept. 3, 1999) (copy attached). In that ruling, a company located outside the state of Illinois sold products to Illinois customers and shipped those products into Illinois via a carrier owned by the same individual that owned the selling company. The Department ruled that the activities of the carrier did not cause the selling company to be subject to Illinois tax laws. *And see Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), in which the United States Supreme Court held that a state may impose use tax collection responsibilities only if an entity has a "substantial nexus" (meaning, at a minimum, a physical presence) in the state. Based on the above, the Company does not have substantial nexus with Illinois.

2. *Income Tax Issues.*

A state may subject an entity to its income tax laws only if that entity has, among other things, a "substantial nexus" with the state. See *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1976). As set forth above, the Company does not have "substantial nexus" with Illinois. And see Private Letter Ruling No. ST-99-0031-PLR (Sept. 3 1999) discussed above, which concluded that a taxpayer with a fact pattern very similar to that presented here was not subject to Illinois tax laws (presumably including income tax laws).

We thank you in advance for your attention to this request. Should you have any questions or require further information, please call me at #####.

In the context of a General Information Letter, the Department is unable to make nexus determinations because the amount of information required to make that determination is often best gathered by an auditor. The following information outlines the principles of nexus. We hope it is helpful to you in determining whether you are responsible to pay tax in Illinois.

An "Illinois Retailer" is one who either accepts purchase orders in the State of Illinois or maintains an inventory in Illinois and fills Illinois orders from that inventory. The Illinois Retailer is then liable for Retailers' Occupation Tax on gross receipts from sales and must collect the corresponding Use Tax incurred by the purchasers.

Another type of retailer is the retailer maintaining a place of business in Illinois. The definition of a "retailer maintaining a place of business in Illinois" is described in 86 Ill. Adm. Code 150.201(i), enclosed. This type of retailer is required to register with the State as an Illinois Use Tax collector. See 86 Ill. Adm. Code 150.801, enclosed. The retailer must collect and remit Use Tax to the State on behalf of the retailer's Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability.

The United States Supreme Court in Quill Corp. v. North Dakota, 112 S.Ct 1904 (1992), set forth the current guidelines for determining what nexus requirements must be met before a person is properly subject to a state's tax laws. The Supreme Court has set out a 2-prong test for nexus. The first prong is whether the Due Process Cause is satisfied. Due process will be satisfied if the person or entity purposely avails itself or himself of the benefits of an economic market in a forum state. Quill at 1910.

The second prong of the Supreme Court's nexus test requires that, if due process requirements have been satisfied, the person or entity must have physical presence in the forum state to satisfy the Commerce Clause. A physical presence is not limited to an office or other physical building. Under Illinois law, it also includes the presence of any agent or representative of the seller. The representative need not be a sales representative. Any type of physical presence in the State of Illinois, including the vendor's delivery and installation of his product on a repetitive basis, will trigger Use Tax collection responsibilities. Please refer to Brown's Furniture, Inc. v. Zehnder, 171 Ill.2d 410 (1996).

The final type of retailer is the out-of-State retailer that does not have sufficient nexus with Illinois to be required to submit to Illinois tax laws. A retailer in this situation does not incur Retailers' Occupation Tax on sales into Illinois and is not required to collect Use Tax on behalf of its Illinois customers. However, the retailer's Illinois customers will still incur Use Tax on the purchase of the out-of-State goods and have a duty to self-assess their Use Tax liability and remit the amount directly to the State. The Use Tax rate is 6.25%.

I hope this information is helpful. The Department of Revenue maintains a website, which can be accessed at www.revenue.state.il.us. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Melanie A. Jarvis
Associate Counsel

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